

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

HOWARD GREGG DIAMOND,

Defendant.

\*

\* CASE NO.

\* 4:17-CR-118-1-MAC-CAN

\* SHERMAN, TEXAS

\* FRIDAY

\* OCTOBER 5, 2018

\* 11:15 A.M. TO 11:42 A.M.

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TRANSCRIPT OF

CHANGE OF PLEA HEARING

BEFORE THE HONORABLE CHRISTINE A. NOWAK

UNITED STATES MAGISTRATE JUDGE

OCTOBER 5, 2018  
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A P P E A R A N C E S

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1       SHERMAN, TEXAS; FRIDAY, OCTOBER 5, 2018; 11:15 A.M.

2       (Call to Order of the Court)

3               THE COURT: Thank you, everyone. Please  
4 be seated.

5               All right. At this time the Court will call  
6 Cause Number will call Cause Number 4:17-CR-118, the  
7 United States of America versus Howard Gregg Diamond.

8               If I can have an appearance on behalf of the  
9 Government, please.

10              MS. SMITH: Maureen Smith for the United  
11 States, Your Honor. We're ready to proceed.

12              THE COURT: If I can have an appearance on  
13 behalf of Mr. Diamond.

14              MR. SCHULTE: Pete Schulte for the Defense,  
15 Your Honor. We're ready to proceed.

16              THE COURT: Thank you. And, Mr. Diamond, sur,  
17 can you please state your full name for my record?

18              THE DEFENDANT: Howard -- Howard Gregg Diamond,  
19 M.D.

20              THE COURT: Thank you. Mr. Diamond, I'm just  
21 going to confirm do you continue to speak and understand  
22 English, sir?

23              THE DEFENDANT: Yes.

24              THE COURT: And so you don't need an  
25 interpreter?

1 THE DEFENDANT: I do not need an interpreter.

2 THE COURT: Now, Mr. Diamond, the Court has  
3 been advised that it is your desire and your intent  
4 today to enter a plea to both Counts 1 and 9 of the  
5 Second Superseding Indictment that is pending against  
6 you. Is that accurate?

7 THE DEFENDANT: Yes, ma'am. It is.

8 THE COURT: Now in order for you and I to  
9 further talk about that, I do need to have you sworn.  
10 So if you could please raise your right hand to the best  
11 of your ability, sir.

12 HOWARD GREGG DIAMOND, DEFENDANT, DULY SWORN

13 THE COURT: All right. Now, Mr. Diamond, if  
14 you'll just confirm for me, do you have a copy of that  
15 Second Superseding Indictment with you, sir?

16 THE DEFENDANT: Yes, ma'am.

17 THE COURT: And if you'll just confirm for me  
18 that you have had an opportunity to review that  
19 Indictment in its entirety, including specifically  
20 Counts 1 and 9 to which you are attempting to enter a  
21 plea?

22 THE DEFENDANT: Yes, ma'am. I have.

23 THE COURT: Now before you and I are able to  
24 proceed here today, we've got to talk about this  
25 document that your counsel has provided to me, and it's

1 entitled "Consent To Administration of Guilty Plea and  
2 Allocation by United States Magistrate Judge." Now if I  
3 turn to the next to the last page, Mr. Diamond, is this  
4 your signature here?

5 THE DEFENDANT: Yes, ma'am. It is.

6 THE COURT: Now remembering you're under oath,  
7 did you read this document before you signed it?

8 THE DEFENDANT: Yes, ma'am.

9 THE COURT: And did you talk with your lawyer  
10 about it?

11 THE DEFENDANT: Yes, ma'am.

12 THE COURT: And so, Mr. Diamond, do you fully  
13 understand you have the right to appear before the  
14 district judge who's assigned to your case in order to  
15 enter any plea?

16 THE DEFENDANT: Yes, I do.

17 THE COURT: Do you understand the impact of  
18 signing this particular document is you're going to give  
19 up that right and you're going to agree to enter your  
20 plea before me, a magistrate judge?

21 THE DEFENDANT: Yes, ma'am. I'm aware.

22 THE COURT: Is that what you want to do?

23 THE DEFENDANT: Yes, ma'am. I do.

24 THE COURT: So no one's forced you to sign this  
25 document. This is your own decision. Is that correct,

1 sir?

2 THE DEFENDANT: Yes, ma'am. That's correct.

3 THE COURT: The Court will find the consent was  
4 knowingly and voluntarily given. I will sign this  
5 consent form at this time, and we will proceed, Mr.  
6 Diamond, with your plea.

7 Now, before we leave this document, though, I  
8 do need to talk with you a little further about your  
9 rights and your options because part of my job is to  
10 make sure that you do truly understand what it is that  
11 you're doing here today. So can you confirm for me,  
12 sir, do you understand you don't have to enter a guilty  
13 plea? You, in fact, have a constitutional right to  
14 enter a plea of not guilty to these charges that are  
15 pending against you in the Second Superseding  
16 Indictment. Do you understand that?

17 THE DEFENDANT: Yes, I do.

18 THE COURT: Do you further understand that if  
19 you were to enter a plea of not guilty that the  
20 Constitution of the United States affords you certain  
21 rights, and those rights are sometimes called your trial  
22 rights. Now they're contained in that consent form, but  
23 because they are so important and I need to make sure  
24 that you understand what you're giving up by proceeding  
25 in this manner, I'm going to read them to you again at

1 this time. All right?

2 THE DEFENDANT: Okay.

3 THE COURT: Mr. Diamond, if you are to plead  
4 not guilty, the Constitution of the United States would  
5 guarantee you, sir, the right to a speedy and public  
6 trial by a jury in this district; the right at such  
7 trial for you to see, hear, and cross-examine all  
8 witnesses against you and to present evidence; the right  
9 to use the power and process of the Court to compel the  
10 production of any evidence and the attendance of  
11 witnesses in your favor; the right to have the  
12 assistance of an attorney in your defense at all stages  
13 of the proceeding.

14 At the trial, you cannot be compelled to  
15 testify. Whether you would testify would be your own  
16 decision. The United States would be required to prove  
17 your guilt beyond a reasonable doubt at trial. And if  
18 you are found guilty, you would have the right to appeal  
19 your conviction. So do you understand that you have and  
20 you are guaranteed each of those rights that I just read  
21 to you, Mr. Diamond, under the Constitution of the  
22 United States?

23 THE DEFENDANT: Yes, ma'am. I'm aware.

24 THE COURT: Do you further understand that if  
25 you persist in your desire to enter a plea here today

1 and the district court accepts your plea, there will be  
2 no trial?

3 THE DEFENDANT: Yes, ma'am.

4 THE COURT: And so each of those rights that I  
5 just read to you other than the continued assistance of  
6 your counsel, Mr. Schulte, you're going to give those  
7 up?

8 THE DEFENDANT: That's correct. Yes, ma'am.

9 THE COURT: Do you also understand that the  
10 impact of entering a plea here today is that you will be  
11 convicted for both Counts 1 and 9 of the Second  
12 Superseding Indictment?

13 THE DEFENDANT: Yes, ma'am. I understand.

14 THE COURT: So seeing that you do in fact  
15 understand those consequences, I also have to make sure  
16 you're competent. So if you'll just bear with me, okay.  
17 I'm going to ask you some background questions. So can  
18 you confirm for me, sir, have you ever been diagnosed or  
19 treated for any type of narcotics addiction or  
20 alcoholism? Have you ever had a problem with drugs and  
21 alcohol?

22 THE DEFENDANT: No, ma'am.

23 THE COURT: Are you currently under the  
24 influence of any drugs, alcohol, any substance  
25 whatsoever?



1 THE DEFENDANT: No.

2 THE COURT: Have you ever been diagnosed or  
3 treated for any type of emotional illness, mental  
4 disability, or problem, including things like  
5 depression, anxiety?

6 THE DEFENDANT: I -- I've been treated for  
7 depression, yes.

8 THE COURT: Do you think that your past history  
9 as it relates to depression will in any way impact your  
10 ability to understand what's going on here in this  
11 courtroom today?

12 THE DEFENDANT: No, not at all.

13 THE COURT: Have you, in fact, understood  
14 everything we've talked about thus far?

15 THE DEFENDANT: Yes, ma'am. I have.

16 THE COURT: Do you feel physically and mentally  
17 fit for us to go forward?

18 THE DEFENDANT: Yes, I do.

19 THE COURT: And are you telling me that you  
20 fully understand what it is you are trying to do here  
21 today?

22 THE DEFENDANT: I do, ma'am. Yes.

23 THE COURT: Now, Mr. Schulte, you've had a  
24 further opportunity to speak with your client, so I'll  
25 have you confirm as well. Are you aware of any reason

1    whatsoever that Mr. Diamond is not able to enter a  
2    knowing and intelligent plea here today?

3               MR. SCHULTE:   No, Your Honor.

4               THE COURT:   Do you believe him to be fully  
5    competent for us to proceed?

6               MR. SCHULTE:   Yes, Your Honor.

7               THE COURT:   Then I'd like for us to turn and  
8    look at the Second Superseding Indictment together.  Now  
9    I'm going to pull up a copy here on my screen.  Now, Mr.  
10   Diamond, are you looking at a copy there?

11              THE DEFENDANT:  Yes, ma'am.

12              THE COURT:   Now you told me at the outset of  
13   these proceedings that you had had an opportunity to  
14   review that Indictment in its entirety with your  
15   counsel.  Does that remain correct?

16              THE DEFENDANT:  Yes, it is.

17              THE COURT:   Have you also had a full and fair  
18   opportunity to talk with your lawyer about all the facts  
19   of your case and any defenses that you might have to  
20   these two counts to which you're intending to enter a  
21   plea?

22              THE DEFENDANT:  Yes, I have.

23              THE COURT:   Now following all of your  
24   communications with your counsel, are you fully  
25   satisfied with the representation and the advice that

1 you've received in connection with your case as well as  
2 with your decision to enter a guilty plea here today?

3 THE DEFENDANT: Yes, ma'am. I am.

4 THE COURT: So in light of that, I'm going to  
5 tell you there are two ways that we can talk about this  
6 Indictment while you and I are together here today,  
7 okay. Now I could have the whole thing read to you in  
8 its entirety word for word if you would like or, if you  
9 would rather, you may waive the full reading, in which  
10 case I will have the Government just summarize the  
11 charges that you're trying to enter a plea to, being  
12 Counts 1 and 9 of the Second Superseding Indictment. It  
13 is your choice. How would you like to go forward?

14 THE DEFENDANT: I'd like to waive the reading,  
15 please.

16 THE COURT: So in light of the waiver, at this  
17 time I will ask the Government to summarize those counts  
18 to which you're intending to enter a plea. Now, Mr.  
19 Diamond, I'm going to have the Government do one other  
20 thing as well. I'm going to have them read to you what  
21 are called the essential elements of the offense. Those  
22 are the elements the Government would be required to  
23 prove at trial in order for you to actually be  
24 convicted. So if you'll please listen very carefully.

25 MS. SMITH: Yes, Your Honor. The Defendant,

1 Howard Gregg Diamond, is charged in Count 1 of the  
2 Second Superseding Indictment with the violation of  
3 Title 21 United States Code § 846, Conspiracy To Possess  
4 With The Intent to Distribute and Dispense And  
5 Distributing and Dispensing of Controlled Substances,  
6 and Count 9 of the Second Superseding Indictment with a  
7 violation of Title 18 United States Code § 1347 and 2,  
8 Health Care Fraud and Aiding and Abetting.

9           The essential elements which must be proved  
10 beyond a reasonable doubt in order to establish a  
11 violation of each of those sections are as follows,  
12 Count 1:

13           (1) that the Defendant and one or more persons  
14 in some way or manner made an agreement to commit the  
15 crime charged in the Second Superseding Indictment, that  
16 is to possess with the intent to distribute the  
17 following controlled substances: fentanyl, morphine,  
18 oxycodone, oxymorphone, methadone, hydrocodone,  
19 hydromorphone, alprazolam, zolpidem, carisoprodol, and  
20 diazepam;

21           (2) that you knew the unlawful purpose of the  
22 agreement;

23           (3) that the Defendant joined in the agreement  
24 willfully, that is, with the intent to further its  
25 unlawful purpose;

1           (4) that the overall scope of the conspiracy  
2 involved fentanyl, morphine, oxycodone, oxymorphone,  
3 methadone, hydrocodone, hydromorphone, alprazolam,  
4 zolpidem, carisoprodol, and diazepam;

5           (5) that the Defendant knew or reasonably  
6 should have known that the scope of the conspiracy  
7 involved all of those drugs I just stated.

8           For Count 9, the elements which must be proved  
9 beyond a reasonable doubt are:

10           (1) that the Defendant knowingly and willfully  
11 executed a scheme or artifice to defraud a health care  
12 benefit program, that is, Medicare or to obtain money or  
13 property from a health care benefit program, that is,  
14 Medicare by means of false or fraudulent pretenses,  
15 representations, or promises in connection with the  
16 delivery of or payment for health care benefits, items,  
17 or services;

18           (2) that the Defendant acted with a specific  
19 intent to defraud a health care benefit program;

20           (3) that the false or fraudulent pretenses,  
21 representations, or promises that the Defendant made  
22 were material; and

23           (4) that the operation of the health care  
24 benefit program affected interstate commerce.

25           THE COURT: Thank you.

1           So, Mr. Diamond, I'm going to ask you some  
2 questions about that information. So let's start off  
3 with the counts. Do you understand the charges that are  
4 pending against you in each of Counts 1 and 9 of the  
5 Second Superseding Indictment to which you are trying to  
6 enter a plea?

7           THE DEFENDANT: Yes, I do understand them  
8 completely.

9           THE COURT: Did you also understand each of  
10 those essential elements that were just read to you for  
11 both Counts 1 and 9?

12          THE DEFENDANT: Yes, I do.

13          THE COURT: Now, do you understand, Mr.  
14 Diamond, that when you enter your plea here today to  
15 both Count 1 and 9, what you'll be doing is admitting to  
16 these essential elements?

17          THE DEFENDANT: Correct. Yes, ma'am.

18          THE COURT: And do you, in fact, admit to each  
19 of these essential elements, sir?

20          THE DEFENDANT: Yes, ma'am. I do.

21          THE COURT: Now I understand that you have an  
22 11(c)(1)(C) plea agreement. Notwithstanding that fact,  
23 it's still my obligation to make sure that you  
24 understand what the full range of penalties and  
25 consequences associated with these counts are. And so I

1 am going to ask the Government to advise you of that at  
2 this time.

3 MS. SMITH: Yes, Your Honor. For Count 1, the  
4 penalty range is not less than 10 years and not more  
5 than life in imprisonment, a fine not to exceed \$10  
6 million or both, supervised release of at least five  
7 years. If death or serious bodily injury results from  
8 the uses of such substances, then a term of imprisonment  
9 of not less than 20 years or more than life, a fine not  
10 to exceed \$10 million or both, a term of supervised  
11 release of at least five years. There's also a  
12 mandatory special assessment.

13 For Count 9, the penalty range is not more than  
14 ten years imprisonment, a fine not to exceed \$250,000,  
15 or not more than twice the gross gain or both,  
16 supervised release of not more than three years. If  
17 serious bodily injury resulted, then a term of  
18 imprisonment of not more than 20 years, and the fine and  
19 the term of supervised release remain the same.

20 THE COURT: Now again, Mr. Diamond, I  
21 understand you have an 11(c)(1)(C) plea agreement. Do  
22 you understand, however, that that is the full range of  
23 penalties and consequences that is associated with each  
24 of the counts to which you are intending to enter a  
25 plea?

1 THE DEFENDANT: Yes, ma'am. I do.

2 THE COURT: Now, I also want to make sure that  
3 you understand how sentencing works in the federal court  
4 system. So can you confirm for me do you understand,  
5 sir, that whether you enter this plea here today or you  
6 are to press forward to trial and you are to be  
7 convicted by a jury, in either of those circumstances,  
8 it will be the federal district judge who will do your  
9 sentencing? Do you understand that?

10 THE DEFENDANT: Yes, ma'am.

11 THE COURT: And do you understand that in  
12 deciding whether or not to accept your 11(c)(1)(C)  
13 agreement, the federal district judge will look to but  
14 is not obligated to follow the Federal Sentencing  
15 Guidelines?

16 THE DEFENDANT: Yes, ma'am. I understand that.

17 THE COURT: And so have you and Mr. Schulte sat  
18 down and have y'all talked about how those guidelines  
19 might be used or applied in your particular case?

20 THE DEFENDANT: Yes, extensively.

21 THE COURT: And you fully understand the  
22 guidelines, they're not mandatory, they're merely  
23 discretionary?

24 THE DEFENDANT: Yes, ma'am.

25 THE COURT: And that means the district judge



1 is not obligated to follow them?

2 THE DEFENDANT: Correct. Yes, ma'am.

3 THE COURT: Now, Mr. Diamond, do you also  
4 understand that the guideline range for your particular  
5 case is not able to be determined until after completion  
6 of your written presentence report?

7 THE DEFENDANT: Yes, I understand that.

8 THE COURT: And so for that reason, any  
9 estimate that Mr. Schulte, the Government, Pretrial,  
10 anyone has given you to date, that's all it is, an  
11 estimate? Do you understand?

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: So with that, let's go ahead and  
14 turn and look at your Plea Agreement. Now I have a copy  
15 of your Plea Agreement here. And, sir, if I turn to  
16 page 10 of your Plea Agreement, and again, remembering  
17 you're under oath, is this your signature here?

18 THE DEFENDANT: Yes, ma'am.

19 THE COURT: And if I turn as well in your  
20 agreement to page 3, are these your initials next to the  
21 change that was made to paragraph 4 of your Plea  
22 Agreement?

23 THE DEFENDANT: Yes, ma'am. It is.

24 THE COURT: And so I'm going to ask you as to  
25 both your initials and your signature, did you read the

1 entirety of this Plea Agreement before you affixed your  
2 initials or your signature?

3 THE DEFENDANT: Yes, ma'am. I did.

4 THE COURT: Did you talk with your counsel  
5 about each and every one of the paragraphs contained in  
6 this Plea Agreement before you affixed your initials or  
7 your signature to the Plea Agreement?

8 THE DEFENDANT: Yes, ma'am. I have.

9 THE COURT: And as you stand here today, are  
10 you comfortable that you understand everything in your  
11 Plea Agreement?

12 THE DEFENDANT: Yes, I am comfortable. Thank  
13 you.

14 THE COURT: Now, I'd also like for us to talk  
15 about your Plea Agreement Addendum. And if I turn to  
16 the second page, is this your signature on that  
17 Addendum?

18 THE DEFENDANT: Yes, ma'am.

19 THE COURT: Mr. Diamond, if I'm to take your  
20 Plea Agreement and the Addendum thereto, do these two  
21 documents make up the entirety of your agreement with  
22 the Government?

23 THE DEFENDANT: Yes, ma'am. They do.

24 THE COURT: So with that, I am going to ask the  
25 Government to summarize the terms and provisions of your

1 Plea Agreement, including specifically paragraphs 4, 6,  
2 10, and 14.

3 MS. SMITH: Yes, Your Honor. Paragraph 4 of  
4 the Plea Agreement discusses the agreement pursuant to  
5 Federal Rule of Criminal Procedure 11(c)(1)(C). In that  
6 paragraph, the parties agree that the following  
7 stipulations yield the appropriate sentence in this  
8 case: For Count 1, the Defendant will be sentenced to a  
9 term of imprisonment for 20 years. The Defendant will  
10 be sentenced to a term of supervised release of five  
11 years. The Defendant will pay the mandatory special  
12 assessment of \$100 at or prior to the sentencing  
13 hearing. And the Court will determine and impose any  
14 fine.

15 For Count 9, the agreement is that the  
16 Defendant will be sentenced to a term of imprisonment  
17 for ten years. The Defendant will be sentenced to a  
18 term of supervised release of three years. The  
19 Defendant will pay the mandatory special assessment of  
20 \$100 at or prior to the sentencing hearing. And the  
21 Court will determine and impose any fine. There's an  
22 added stipulation that these sentences will run  
23 concurrent.

24 In that paragraph, also, the parties understand  
25 that the Court may decline to accept this agreement. If

1 the Court does not accept the agreement, the Defendant  
2 will be given the opportunity to withdraw from the plea.  
3 The parties understand that the Court is bound only by  
4 the stipulations made pursuant to Rule 11(c)(1)(C). The  
5 parties specifically agree that other specific offense  
6 characteristics or guideline adjustments may increase or  
7 decrease the appropriate sentencing range. Nothing in  
8 this agreement will preclude argument by either party  
9 regarding any other specific offense, characteristic, or  
10 guideline adjustment.

11 There's also a provision for a base offense  
12 level increase under the Career Offender Guidelines or  
13 the Armed Career Criminal Act.

14 Paragraph 6 discusses forfeiture. In that  
15 paragraph, the Defendant agrees to forfeit to the United  
16 States DEA registration numbers for Dr. Howard Gregg  
17 Diamond and any substitute assets.

18 Paragraph 10 discusses the Defendant's waiver  
19 of his right to appeal or otherwise challenge his  
20 sentence. In that paragraph, the Defendant is waiving  
21 his right to appeal his conviction, sentence, fine,  
22 order of restitution, or order of forfeiture in this  
23 case on all grounds. He further agrees not to contest  
24 the conviction, sentence, fine, order of restitution, or  
25 order of forfeiture in any post-conviction proceeding,

1 including but not limited to a proceeding under Title 28  
2 United States Code § 2255.

3           The Defendant is, however, reserving the right  
4 to appeal the failure of the Court after accepting this  
5 agreement to impose a sentence not with -- the failure  
6 of the Court to impose a sentence in accordance with the  
7 terms of this agreement. He is also reserving the right  
8 to appeal or seek collateral review of a claim of  
9 ineffective assistance of counsel.

10           Paragraph 14 discusses the fact that this is  
11 the entirety of the agreement between the Government and  
12 the Defendant. The Defendant, the Defendant's attorney,  
13 and the Government acknowledge that this agreement is a  
14 complete statement of the parties' agreement in this  
15 case. It supersedes all other plea agreements and may  
16 not be modified unless the modification is in writing  
17 and signed by all parties. No other promises have been  
18 made or implied.

19           THE COURT: Now, Mr. Diamond, I'd like for us  
20 to go over each of those paragraphs a little further  
21 just so I can confirm that you do in fact understand  
22 them. We're going to start with that paragraph 4 that's  
23 entitled "Agreement Pursuant to Federal Rule of Criminal  
24 Procedure 1(c)(1)(C)." And I'd like to begin just by  
25 confirming you understand that there has been an

1 addition made here to paragraph 4(e), which reads the  
2 sentences on Counts 1 and Count 9 shall run concurrent  
3 has been added?

4 THE DEFENDANT: Yes, ma'am. Thank you.

5 THE COURT: Have you had a sufficient  
6 opportunity to speak with your counsel regarding this  
7 addition?

8 THE DEFENDANT: Yes, ma'am.

9 THE COURT: And with this addition, do you  
10 still desire to press forward in entering your plea here  
11 today?

12 THE DEFENDANT: Yes, ma'am. I do.

13 THE COURT: Now, by and through paragraph 4, do  
14 you understand there's an agreement by the Government to  
15 recommend or to not oppose that a particular sentence is  
16 appropriate in your case?

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: Do you further understand that  
19 because your agreement with the Government has this  
20 particular provision, the district judge has to decide  
21 whether or not to accept your plea agreement?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: Do you further understand that if  
24 the district judge declines to accept your plea  
25 agreement, you will be given the opportunity to withdraw

1 your plea of guilty and change it to not guilty?

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: If you'll please turn with me next  
4 to look at that paragraph 6, which is entitled  
5 "Forfeiture." I just need to confirm that you  
6 understand that by and through paragraph 6, what you're  
7 agreeing to do is to give up all right, title, and  
8 interest to the property that's listed here in paragraph  
9 6, including specifically any DEA registration numbers  
10 for yourself. Do you understand that's what you're  
11 doing in paragraph 6?

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: Did you voluntarily and of your own  
14 free will agree to give up all right, title, and  
15 interest to this property that's listed here and to not  
16 contest its forfeiture?

17 THE DEFENDANT: Yes, I did.

18 THE COURT: We'll look next at that paragraph  
19 10, which deals with your appellate rights which are  
20 very important. By and through paragraph 10, what  
21 you're agreeing to do is not to contest your conviction  
22 and sentence except on two very limited grounds, and  
23 you're also agreeing not to contest those things in any  
24 post-conviction proceeding, including but not limited to  
25 a Section 2255. Do you understand that's what you're

1 doing in paragraph 10?

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: Even more specifically, you have  
4 only reserved to yourself the right to appeal, sir,  
5 where the Court after accepting your 11(c)(1)(C)  
6 agreement fails to impose a sentence in accordance with  
7 its terms or where you have a claim for ineffective  
8 assistance of counsel. Do you understand that?

9 THE DEFENDANT: Yes, ma'am.

10 THE COURT: And did you voluntarily and of your  
11 own free will agree to give up your appellate rights  
12 except in those two limited circumstances?

13 THE DEFENDANT: Yes, I have.

14 THE COURT: In paragraph 14, entitled "Entirety  
15 of Agreement," I just need to confirm other than your  
16 written Plea Agreement and the Addendum thereto, has  
17 anyone made any other promises or assurances to you in  
18 an effort to induce you to enter a plea here today?

19 THE DEFENDANT: No, ma'am.

20 THE COURT: Mr. Diamond, you and I aren't going  
21 to have an opportunity to walk through each of the  
22 remaining provisions of your Plea Agreement  
23 individually, so I'm going to ask you as to all of them.  
24 Do you have any questions whatsoever about your Plea  
25 Agreement?



1 THE DEFENDANT: I do not.

2 THE COURT: As you stand here today, are you  
3 telling me you voluntarily and of your own free will  
4 agree to each of these terms and provisions?

5 THE DEFENDANT: Yes, I have.

6 THE COURT: That you understand each of these  
7 provisions and you want this Court to accept and approve  
8 this agreement?

9 THE DEFENDANT: Yes, ma'am. I do.

10 THE COURT: Now there's a few other things that  
11 we have to talk about in order for me to make a  
12 recommendation to the district court that your plea  
13 should be accepted. First off, can you tell me, sir,  
14 are you a United States citizen?

15 THE DEFENDANT: Yes, ma'am.

16 THE COURT: Have you ever previously been  
17 convicted of a felony offense?

18 THE DEFENDANT: No, ma'am.

19 THE COURT: Have you and Mr. Schulte discussed  
20 the impact that will come on your citizenship rights by  
21 virtue of entering a plea to a felony offense, including  
22 specifically that you may lose the right to vote, to  
23 hold public office, to sit on a jury, or to possess a  
24 firearm?

25 THE DEFENDANT: Yes, ma'am.

1           THE COURT: And being apprised of those impacts  
2 or losses of your citizenship rights, do you still  
3 desire to press forward in entering a plea here today?

4           THE DEFENDANT: Yes, ma'am. I do.

5           THE COURT: There are two other things you and  
6 I have to talk about today. The first of those is  
7 whether or not your plea is knowingly and voluntarily  
8 given. I can only take your plea if you're actually  
9 guilty of these charges. And so can you tell me, Mr.  
10 Diamond, has anyone attempted to force you, threaten  
11 you, coerce you, or make you enter a plea here today?

12           THE DEFENDANT: No, ma'am.

13           THE COURT: Are you here today of your own free  
14 will?

15           THE DEFENDANT: Yes, I am.

16           THE COURT: Because you are actually guilty of  
17 Counts 1 and 9?

18           THE DEFENDANT: Yes, ma'am.

19           THE COURT: There's one final document you and  
20 I need to discuss then, and it's a copy of your Factual  
21 Basis, which I have here in my hands. And if I turn to  
22 the next to the last page -- oh, excuse me, the page 3,  
23 is this your signature, Mr. Diamond?

24           THE DEFENDANT: Yes, ma'am.

25           THE COURT: Did you read this Factual Basis in

1 its entirety before you signed it?

2 THE DEFENDANT: Yes, I have.

3 THE COURT: Did you talk with your lawyer about  
4 each and every one of these paragraphs before you signed  
5 it?

6 THE DEFENDANT: Yes, I did.

7 THE COURT: Were you comfortable you understood  
8 everything in this Factual Basis before you signed it?

9 THE DEFENDANT: Yes, ma'am.

10 THE COURT: Then I will ask the Government to  
11 read the Factual Basis into the record.

12 MS. SMITH: Yes, Your Honor. The Defendant,  
13 Howard Gregg Diamond, hereby stipulates and agrees that  
14 at all times relevant to the Second Superseding  
15 Indictment herein the following facts were true:

16 (1) that the Defendant, Howard Gregg Diamond,  
17 who's changing his plea to guilty is the same person  
18 charged in the Second Superseding Indictment;

19 (2) that the events described in the Second  
20 Superseding Indictment occurred in the Eastern District  
21 of Texas and elsewhere;

22 (3) that Howard Gregg Diamond knowingly  
23 possessed controlled substances;

24 (4) that Howard Gregg Diamond and one or more  
25 persons in some way or manner made an agreement to

1 commit the crimes charged in the Second Superseding  
2 Indictment, that is, to knowingly and intentionally  
3 possess with the intent to distribute the following  
4 controlled substances: fentanyl, morphine, oxycodone,  
5 oxymorphone, methadone, hydrocodone, hydromorphone,  
6 alprazolam, zolpidem, carisoprodol, and diazepam;

7 (5) that Howard Gregg Diamond knew the unlawful  
8 purpose of the agreement and joined in it with the  
9 intent to further it;

10 (6) that Howard Gregg Diamond knew or  
11 reasonably should have known that the scope of the  
12 conspiracy involved the controlled substances listed  
13 above. This quantity was distributed or possessed with  
14 the intent to distribute by the conspiracy while the  
15 Defendant was a member of the conspiracy and was  
16 foreseeable to the Defendant and part of jointly  
17 undertaken criminal activity;

18 (7) that Howard Gregg Diamond distributed or  
19 dispensed morphine, oxycodone, alprazolam, and zolpidem  
20 on July 15th, 2014, that resulted in the death of T.H.  
21 on July 25th, 2014;

22 (8) that on or about September 29th in  
23 connection with a delivery and payment for health care  
24 benefits, items and services, Howard Gregg Diamond  
25 knowingly and willfully executed a scheme or artifice to

1 defraud Medicare and to obtain money or property from  
2 Medicare by means of false or fraudulent pretenses,  
3 representations, and promises. In that, Howard Gregg  
4 Diamond submitted or caused to be submitted a claim to  
5 Medicare that falsely represented that he treated a  
6 Medicare beneficiary identified as HICN0846A on  
7 September 29th, 2015, when in truth and in fact he  
8 travelled to Boston, Massachusetts during this alleged  
9 date of service and did not treat the Medicare  
10 beneficiary identified above;

11 (9) that Howard Gregg Diamond acted voluntarily  
12 and intentionally, and he knew it was unlawful to  
13 represent to Medicare that he treated a Medicare  
14 beneficiary when in fact he did not;

15 (10) that Howard Gregg Diamond acted with a  
16 specific intent to defraud Medicare in that he acted  
17 knowingly and with the specific intent to deceive for  
18 the purpose of obtaining money from Medicare;

19 (11) that Howard Gregg Diamond's false  
20 representation that he treated Medicare beneficiary  
21 HICN0846A was material because Medicare pays a higher  
22 amount for services performed by a physician;

23 (12) that Howard Gregg Diamond understands that  
24 Medicare is a health care benefit program affecting  
25 interstate commerce under which health care benefits,

1 items, and services are provided to Medicare  
2 beneficiaries and paid for by Medicare.

3 THE COURT: Mr. Diamond, is everything  
4 contained in this Factual Basis true and correct?

5 THE DEFENDANT: Yes, ma'am.

6 THE COURT: Are there any changes or  
7 corrections that you would ask be made?

8 THE DEFENDANT: No, ma'am.

9 THE COURT: Do you understand that by admitting  
10 that you engaged in the conduct that's described in the  
11 Factual Basis, what you are doing is admitting to both  
12 Counts 1 and 9 of the Second Superseding Indictment?

13 THE DEFENDANT: Yes, ma'am. I understand.

14 THE COURT: Notwithstanding that I have this  
15 Factual Basis, I will still ask for you to tell me in  
16 your own words here today why are you here, what was  
17 your conduct?

18 THE DEFENDANT: I prescribed prescription drugs  
19 to some of my patients, and today I cannot show that the  
20 prescribed medications were done with a legitimate  
21 medical purpose. This resulted in an overdose --  
22 overdose death of one of my patients. Additionally, I  
23 billed Medicare for services I did not personally  
24 provide. I accept full responsibility for my actions by  
25 accepting this Plea Agreement.

1           THE COURT: I'll ask both the Government and  
2 Defense counsel at this time having had the Factual  
3 Basis read into the record as supplemented with Mr.  
4 Diamond's statements here in open court, are you each  
5 satisfied there is a factual basis for this plea?

6           MS. SMITH: Yes, Your Honor.

7           MR. SCHULTE: Yes, Your Honor.

8           THE COURT: Are you each also satisfied that  
9 the Court has complied with the requirements of Rule 11  
10 here today?

11          MS. SMITH: Yes, Your Honor.

12          MR. SCHULTE: Yes, Your Honor.

13          THE COURT: Mr. Diamond, sir, have you  
14 understood everything that's gone on here today?

15          THE DEFENDANT: Yes, ma'am. I have.

16          THE COURT: Do you have any questions  
17 whatsoever?

18          THE DEFENDANT: No, ma'am.

19          THE COURT: Would you like a further  
20 opportunity to talk with your lawyer before we go  
21 forward?

22          THE DEFENDANT: No, I'm good. Thank you.

23          THE COURT: And, Mr. Schulte, do you join and  
24 agree in your client's decision to enter this plea here  
25 today?

1 MR. SCHULTE: I do, Your Honor.

2 THE COURT: Then at this time, the Court will  
3 have entered into the record the Consent, the Elements  
4 of the Offense, the Plea Agreement, the Plea Agreement  
5 Addendum, as well as the Factual Basis.

6 And returning to the Second Superseding  
7 Indictment, I will ask you at this time, Howard Gregg  
8 Diamond, you are named in Count 1 and Count 9 of the  
9 Second Superseding Indictment for violations of 21  
10 U.S.C. § 846, Conspiracy To Possess With The Intent To  
11 Distribute and Dispense and Distributing and Dispensing  
12 of Controlled Substances and as well 18 U.S.C. § 1347  
13 and 2, Health Care Fraud and Aiding and Abetting. How  
14 do you now plead to each of Counts 1 and 9 of the Second  
15 Superseding Indictment, guilty or not guilty?

16 THE DEFENDANT: Guilty, Your Honor.

17 THE COURT: In the case of the United States of  
18 America versus Howard Gregg Diamond, Cause Number 4:17-  
19 CR-118, this Court will recommend to the district court,  
20 sir, that your plea be accepted. I will further find at  
21 this time that you are competent to enter this plea,  
22 that you've had the assistance of counsel, that you have  
23 been advised and that you understand your trial rights,  
24 that you have been advised and you understand each of  
25 the charges to which you've entered a plea as well as



1 the full range of penalties and consequences associated  
2 with each of those counts.

3 I do further find that you've been advised and  
4 you understand that those sentencing guidelines, they're  
5 not mandatory, they're merely discretionary. And based  
6 upon your communications here today, I will further find  
7 that your plea is both knowingly and voluntarily given  
8 and that there is a factual basis to support it. I will  
9 prepare a recommendation for the district court.

10 Will both Government and Defense counsel waive  
11 the objections period?

12 MS. SMITH: Yes, Your Honor.

13 MR. SCHULTE: Yes, Your Honor.

14 THE COURT: So I'll do my best to get that  
15 prepared today and get that over to the district court.  
16 What happens from here is your written presentence  
17 report is prepared. Once it's complete, a copy of it  
18 will go to Mr. Schulte. The two of you can sit down,  
19 you can look at it, you can make any objections the two  
20 of you deem necessary. And then you'll next appear  
21 before the Court at the time of sentencing.

22 Do you understand that, Mr. Diamond?

23 THE DEFENDANT: Yes, ma'am.

24 THE COURT: Is there anything further from the  
25 Government on this plea?

1 MS. SMITH: No, Your Honor.

2 THE COURT: Anything further, Mr. Schulte?

3 MR. SCHULTE: No, Your Honor.

4 THE COURT: Then at this time, Mr. Diamond, I  
5 will have you remanded into the custody of the United  
6 States marshals, and Court will be adjourned. Thank you  
7 everyone.

8 (Proceedings adjourned at 11:42 a.m.)

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CERTIFICATE OF TRANSCRIBER

I, Dipti Patel, court-approved transcriber,  
certify that the foregoing is a full and correct  
transcript from the official electronic sound recording  
of the proceedings in the above-entitled matter.

/s/ Dipti Patel

Dipti Patel, CET-997

847.848.4907

Date: October 14, 2018